Supreme Court, U.S.
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No. 98 1257 JAN 27 1999

In the

Supreme Court of the United States

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October Term, 1998

GEORGE KIRSTEIN and JOY KIRSTEIN,

Petitioners,

-v-

PARKS CORPORATION,

Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

WHETHER, UNDER GENERAL ELECTRIC COMPANY V. JOINER, IT IS AN ABUSE OF DISCRETION FOR A DISTRICT COURT TO BAR AN EXPERT WITHOUT UNDERTAKING A DAUBERT HEARING.

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JURISDICTION

On October 28, 1997, the United States District Court for the Northern District of Illinois granted summary judgment in favor of the defendants.

The petitioner appealed to the United States Court of Appeals for the Seventh Circuit and on October 29, 1998, that court affirmed the grant of summary judgment to the respondent.

This Court has jurisdiction to review this case under 28 U.S. Code §1254.

STATUTES INVOLVED

Federal Rule of Evidence 104

(a) Questions of admissibility generally.

Preliminary questions concerning the qualification of a person to be a witness, the existence of a privilege, or the admissibility of evidence shall be determined by the court, subject to the provisions of subdivision (b). In making its determination it is not bound by the rules of evidence except those with respect to privileges.

(b) Relevancy conditioned on fact.

When the relevancy of evidence depends upon the fulfillment of a condition of fact, the court shall admit it upon, or subject to, the introduction of evidence sufficient to support a finding of the fulfillment of the condition.

(c) Hearing of jury.

Hearings on the admissibility of confessions shall in all cases be conducted out of the hearing of the jury. Hearings on other preliminary matters shall be so conducted when the interests of justice require, or when an accused is a witness and so requests.

(d) Testimony by accused.

The accused does not, by testifying upon a preliminary matter, become subject to cross-examination as to other issues in the case.

(e) Weight and credibility.

This rule does not limit the right of a party to introduce before the jury evidence relevant to weight or credibility.

STATEMENT OF THE CASE

George Kirstein was seriously burned while using chemical products to remove linoleum at his home in Westmont, Illinois. Thereafter, he and his wife brought a products liability suit, seeking damages for his injuries, in an Illinois state court. The Parks Corporation and W.M. Barr & Company removed the case to federal court, where the district judge

granted summary judgment, dismissing both defendants, and the Kirsteins appealed only as to Parks.

When Kirstein removed the linoleum from his kitchen, foyer, hallway, and bathroom, he discovered that he also had to remove adhesive left underneath the linoleum on the floor. He purchased an adhesive remover manufactured by Parks and heeded the warnings on the container -- he provided adequate ventilation and kept the product away from heat, sparks, and flame in order to eliminate the risk that toxic gases would be produced. He used the product without incident, but unfortunately the adhesive remover left a residue. Checking the label on the product, he found that Parks recommended the use of its lacquer thinner to clean up the adhesive remover residue. He bought a lacquer thinner manufactured by Barr, a product not different from the Parks product in any significant way. He heeded the even stronger warnings on the lacquer thinner label, warnings about the danger of flash fires or explosions. He opened doors, turned down the hot water heater so it would not ignite, and set his air conditioner at 79 degrees.

He used the product, proceeding from the kitchen, through the foyer, into the bathroom, and down the hallway. When he was in the hallway, he closed the door to the outside because it blocked an area he needed to clean. Soon after he closed the door, an explosion occurred. It was later determined that the explosion originated in a furnace return grill located in the foyer adjacent to a door leading to a garage. The ignition source was the electric motor for the air conditioning unit. As the fire spread over the floor, Kirstein started to slip. His shoes were burned off and his feet were incinerated. He was severely burned over 20 percent of his body, with the most extensive burns on his hands and feet. The plaintiff's expert

gave the opinion that the mixture of the lacquer thinner and adhesive remover increased the danger for the consumer.

The Kirsteins sued the manufacturers of the two products Mr. Kirstein was using as well as the retailers from whom he bought the products. The retailers were dismissed by agreement. The suit proceeded -- now in federal court -- against the manufacturers, both of whom moved for summary judgment.

The District Court, had before it only the criticism of the defendant's attorneys that Dr. Gary Nelson, the plaintiff's expert, was not a chemist and could not give a chemical opinion as to the cause of the ignition and/or the aggravation of injury by the mixture. There were no expert opinions of record urging a chemical analysis. Dr. Nelson himself denied that a chemical analysis was even necessary. The judge did not hold any hearing on her exclusion of the expert.

REASONS FOR GRANTING THE WRIT

I. THIS COURT SHOULD GRANT THE PETITION FOR WRIT OF CERTIORARI TO CLARIFY WHETHER OR NOT A DAUBERT HEARING SHOULD BE HELD PRIOR TO DISMISSAL OF AN EXPERT.

Daubert v. Merrill Dow Pharmaceuticals, Inc., 509 U.S.579, 113 S.Ct. 2786 (1993), grants the power to the District Court to exclude plaintiff's expert evidence as part of its gatekeeping function. In order to best insure relevant and reliable testimony and exclude unsupported speculation, *Daubert* establishes a two-prong test which requires a District Court, before it may admit scientific testimony, to determine whether the expert is proposing to testify to scientific

knowledge and whether that will assist the trier of fact to understand or determine the issue. *Daubert* suggests that the Court utilize certain factors in determining whether a particular theory is reliable: (1) its empirical testability; (2) whether the theory or study has been published or subject to peer review; (3) whether the known or potential rate of error is acceptable; and (4) whether the method is generally accepted in the scientific community. 509 U.S. @ 593, 595, 113 S.Ct. @ 2796, 2798. In the instant case, the District Court made a finding that the question of whether adhesive remover absorbs methylethylketone in lacquer thinner and gradually releases the vapor is a question of science (Appendix at 19a). Dr. Nelson stated that it was not necessary to have the mixture chemically tested as the Material Safety Data Sheets on the products gave sufficient information for a safety engineer to formulate an opinion. The Court's conclusion, that his opinion was a matter of science and needed testing to validate his conclusions, was not supported by any evidence in the record. No expert had come forward on behalf of the defendants stating that (1) Dr. Nelson's theory was incorrect; and (2) testing was necessary to support the theory. Consequently, the District Court granted the motion for summary judgment and the plaintiffs appealed.

The U.S. Court of Appeals held that the District Court, while acknowledging that Dr. Nelson had respectable credentials, concluded that because he was not a chemist and the combination of these products required knowledge of chemistry, his opinion failed the first part of the *Daubert* test. (Appendix p. 4a) The petitioners argued they were entitled to a hearing on the admissibility of the expert opinion pursuant to *In Re Paoli R.R. Yard PCB Litigation,* 916 F.2d 829 (3d Cir. 1990) (*Paoli I*). The 7th Circuit rejected that assertion stating that a Daubert inquiry need not take any specific form and, in fact,

within that circuit a *sua sponte* consideration of the admissibility of expert testimony is appropriate. *O'Connor v. Commonwealth Edison Co.*, 13 F.3d 1090 (7th Cir. 1994). (App. 4a)

In *Paoli I*, the district court did not hold an *in limine* hearing and found summary judgment in favor of the defendants based on the inadequacy of plaintiff's experts in a toxic tort case. The plaintiffs did not request an *in limine* hearing and actually opposed it. 916 F. 2d 854. The appellate court held that,

> Closely related to the question whether the district court conducted an appropriate and adequate factual inquiry, is the question whether the court provided the plaintiffs with sufficient process for defending their evidentiary submissions. The adversarial process upon which our legal system is based, assumes that a fact finder will give the parties an adequate opportunity to be heard. If it does not, it cannot find facts reliably. Thus the detailed factual record requirement, firmly entrenched in our jurisprudence requires adequate process at the evidentiary stage, particularly when a summary judgment may flow from it. The district court did not afford that process here.

Id.

The concept of a Paoli hearing is not new and is contemplated by Federal Rule of Evidence 104. This rule requires that preliminary questions concerning the qualification of a person to be a witness or the admissibility of evidence shall

be determined by the court. Rule 104(c) states that, "hearings on other preliminary matters shall be so conducted when the interest of justice require." It is clear that Rule 104 was drafted with the intent to be a trial rule but it applies to pre-trial proceedings. *In Re Paoli R.R. Yard PCB Litigation*, 35 F.3d 717, 739 (3d Cir. 1994) (Paoli 2). The important result of a *Paoli* hearing is that it requires the opposing party to clearly state its attack on the expert's qualifications when the proponent of the expert testimony can actually do something about it.

In the instant case, the defendants produced no evidence whatsoever to support their assertions that (1) Dr. Nelson's testimony was scientific, (2) that testing was required, and (3) that his opinion was deficient without testing. The District Court adopted the defendant's argument without requiring any proof under *Daubert*. The national importance of requiring *Daubert* hearings will be that the proponent of expert evidence will not be surprised by an opponent's attack on the expert as the attack will be in the nature of a presentation of evidence with proper procedure. Not only will the proponent of the evidence be placed on notice as to claimed defects, but what amounts to a case dispositive question will be fully addressed by the court. A hearing also will enable the courts to assess the foundations for the expert's opinions. Very often these foundations are lacking because they are provided to the court in the form of an expert disclosure. When the summary judgment procedure is used, the expert disclosure is frequently inadequate to resist summary judgment. The suggestion that perhaps expert disclosures should be lengthier and in greater detail will be extraordinarily burdensome and expensive to litigants as all of the *Daubert* factors would have to be disclosed in detail and at length, including exhibits putting forth the results of all tests and copies of the learned treatises

that the experts have used to come to their opinions. It would be an impermissible burden on proponents of experts to be required to do this even when the expert is not under challenge.

II. THE COURT OF APPEALS ERRED IN AFFIRMING THE DISTRICT COURT'S DECISION TO EXCLUDE THE EXPERT UNDER DAUBERT WHEN THE DISTRICT COURT HAD AN INSUFFICIENT RECORD.

In the instant case, the district court had no evidence before it that testing was required to prove that the combination of the products used was more dangerous. In fact, she had Dr. Nelson's testimony that it was not required. This points to an abuse of discretion.

In *Cortez Irizarry v. Corporacion Insular De Seguros*, 111 F.3d 184 (lst Cir. 1997), the U.S. Court of Appeals for the lst Circuit cautioned the use of *Daubert* analysis in connection with summary judgment motions.

> "The fact that *Daubert* can be used in connection with summary judgment motions does not mean that it should be used profligately. A trial setting normally will provide the best operating environment for the triage which *Daubert* demands. Voir dire is an extremely helpful device in evaluating proffered expert testimony, see *Sepulveda*, 15 F.3d at 1184 n. 15, and this device is not readily available in the course of summary judgment proceedings. Moreover, given the complex factual inquiry required by *Daubert*, courts will be hard-pressed in all but the most clear-cut cases to

> gauge the reliability of expert proof on a truncated record. Because the summary judgment process does not conform well to the discipline that *Daubert* imposes, the *Daubert* regime should be employed only with great care and circumspection at the summary judgment stage."

Id. at p.188

General Electric v. Joiner, _ U.S. _, 118 S.Ct. 512, 517 (1997) provides that the abuse of discretion standard should be used by the courts in reviewing district court determinations under *Daubert*. In *Kannankeril v. Terminix International, Inc.*, 128 F.3d 802 (3d Cir. 1997), the court found an abuse of discretion in the district court ruling that an expert may rely only on a certain type of test to determine whether an individual had been exposed to a chemical. The court noted that there was no expert opinion in the record to establish that an ambient air test is the only appropriate way to gauge exposure to the compound. *Id.* at 808. The court noted that the trial court must not mistake credibility questions for admissibility questions. *Id.*

This is precisely the situation that faced the District Court in the instant case. Here, the District Court ruled that only a chemical test of the compound would be admissible. All other determinations of the compounds' effect on the plaintiff were unscientific. The District Court, in the instant case, mistook questions of credibility for questions of admissibility, thereby abusing its discretion. This is especially true when it is noted that there is nothing in the record to suggest that a chemical test had to be undertaken to render the opinion that the expert did. The state of the record required for a

court to perform its gatekeeping function should be established by this Court to provide consistency in the administration of justice.

CONCLUSION

For the foregoing reasons, the petitioners respectfully request that the decision of the Seventh Circuit be reversed.

Respectfully submitted,

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Dated: January 20, 1999

159 F.3d 1065

No. 97-4257

UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

GEORGE KIRSTEIN and JOY KIRSTEIN, Plaintiffs-Appellants, v. PARKS CORPORATION, Defendant-Appellee.

September 25, 1998, Argued
October 29, 1998, Decided

JUDGES: Before FLAUM, MANION, and EVANS, Circuit Judges.

OPINION BY: EVANS

OPINION: EVANS, Circuit Judge. The kind of thing that all do-it-your-selfers assume will not happen to them happened to George Kirstein. He was seriously burned while using chemical products to remove linoleum at his home in Westmont, Illinois. Thereafter, he and his wife brought this products liability suit, seeking damages for his injuries, in an Illinois state court. The Parks Corporation and W.M. Barr & Company removed the case to federal court, where the district judge granted summary judgment, dismissing both defendants, and the Kirsteins appeal only as to Parks.

When Kirstein removed the linoleum from his kitchen, foyer, hallway, and bathroom, he discovered that he also had to remove adhesive left underneath the linoleum on the floor. He purchased an adhesive remover manufactured by Parks and heeded the warnings on the container--he provided adequate ventilation and kept the product away from heat, sparks, and flame in order to eliminate the risk that toxic gases would be produced. He used the product without incident, but unfortunately the adhesive remover left a residue. Checking the label on the product, he found that Parks recommended the use of its lacquer thinner to clean up the adhesive remover residue. He bought a lacquer thinner manufactured by Barr, a product not different from the Parks product in any significant way. He heeded the even stronger warnings on the lacquer thinner label, warnings about the danger of flash fires or explosions. He opened doors, turned down the hot water heater so it would not ignite, and set his air conditioner at 79 degrees.

He used the product, proceeding from the kitchen, through the foyer, into the bathroom, and down the hallway. When he was in the hallway, he closed the door to the outside because it blocked an area he needed to clean. Soon after he closed the door, an explosion occurred. It was later determined that the explosion originated in a furnace return grill located in the foyer adjacent to a door leading to a garage. The ignition source was the electric motor for the air conditioning unit. As the fire spread over the floor, Kirstein started to slip. His shoes were burned off and his feet were incinerated. He was severely burned over 20 percent of his body, with the most extensive burns on his hands and feet.

The Kirsteins sued the manufacturers of the two products Mr. Kirstein was using as well as the retailers from whom he bought the products. The retailers were dismissed by

agreement. The suit proceeded--now in federal court--against the manufacturers, both of whom moved for summary judgment. The motions were granted in one of the orders we now review. The others are an order denying a request to present a second expert opinion and an order denying reconsideration of the summary judgment decision.

The Kirsteins have a difficult case to make on the merits. The lacquer thinner is almost certainly what caused the explosion, but its container contains warnings which comply with the Federal Hazardous Substances Act, 15 U.S.C. § 1261, and this preempts the claim against Barr. That's why, it seems, the suit against Barr is not being pursued on appeal. What the Kirsteins claim is that the Parks adhesive remover, while perhaps safe in itself, includes an instruction which renders the product unsafe. That instruction is that for cleanup of the residue of adhesive remover, one should use lacquer thinner. No warning on the adhesive remover container states that use of lacquer thinner is hazardous.

In what has been a rather protean theory, the Kirsteins contend that the combination of the products caused the severity of Kirstein's burns. We will have more to say about the changing nature of the theory later, but for now we need only say that the case was heavily dependent on the opinion of the Kirsteins' expert, Dr. Gary Nelson, regarding the combination of the products. Both defendants moved for summary judgment, in which the admissibility of Dr. Nelson's opinion became a significant issue. Ultimately, his opinion testimony was excluded under Daubert v. Merrell Dow Pharmaceuticals, Inc., 509 U.S. 579, 125 L. Ed. 2d 469, 113 S. Ct. 2786 (1993), and its exclusion became the underpinning of the decision granting summary judgment. Just prior to the ruling on summary judgment, the Kirsteins requested leave to present

an opinion from a second expert. That request was denied as was a later motion to reconsider.

We review summary judgment de novo. Porter v. Whitehall Laboratories, Inc., 9 F.3d 607 (7th Cir. 1993). However, the Daubert issue is reviewed for an abuse of discretion, General Electric v. Joiner, 139 L. Ed. 2d 508, 118 S. Ct. 512 (1997).

The district judge carefully analyzed the Daubert issue by employing the two-step inquiry for evaluating expert testimony under Rule 702. First, she looked to see if the expert's testimony is reliable; and, if so, whether it would assist the trier of fact. Cummins v. Lyle Industries, 93 F.3d 362 (7th Cir. 1996). She acknowledged that Dr. Nelson had respectable credentials, but she nevertheless concluded that because he was not a chemist (and, in her view, the combination of these products required knowledge of chemistry) and did no testing, his opinion failed the first part of the Daubert test. Based on Rosen v. Ciba-Geigy Corp., 78 F.3d 316 (7th Cir. 1996), her conclusion was that she was confronted with "unscientific speculation offered by a genuine scientist."

As a preliminary matter, the Kirsteins claim they were entitled to a hearing on the admissibility of the expert opinion pursuant to In Re Paoli R.R. Yard PCB Litigation, 916 F.2d 829 (3rd Cir. 1990). We are convinced, however, that the district court had a sufficient basis for her decision without holding a hearing. We have not required that the Daubert inquiry take any specific form and have, in fact, upheld a judge's sua sponte consideration of the admissibility of expert testimony. O'Conner v. Commonwealth Edison Co., 13 F.3d 1090 (7th Cir. 1994).

Furthermore, we see no abuse of discretion in the exclusion of the expert. It is true that Dr. Nelson has impressive credentials. He is a safety engineer. His educational background is in industrial and product safety. He has a Ph.D. from Texas A&M University. He was vice president of the Texas Safety Association and is a member of the National Fire Protection Association. But the fact is that he did no testing on these products, either alone or in combination. Neither did he provide studies which employed such testing. In short, Dr. Nelson offered only speculation. And we have sanctioned the exclusion of speculation offered by persons with credentials as impressive as those of Dr. Nelson. In Rosen, for instance, the expert whose exclusion we upheld was a "distinguished cardiologist and department head at the University of Chicago." 78 F.3d at 318.

The fact that Dr. Nelson did no testing may account as well for what we have referred to as the protean nature of the theory of what happened here. The amended complaint says Kirstein "read and carefully followed the labels on the products to the best of his ability when suddenly the products and the combination of them exploded, causing serious injury." But the initial report of Dr. Nelson, which dealt primarily with the inadequacy of the warnings on the products, did not clearly mention any increased danger from the combination of the products. The closest he came is a statement that "Barr and Parks apparently failed to reasonably and properly foresee the circumstances (or readily conceivable similar circumstances) that resulted in Mr. Kirstein's injury." We find the theory of an increased danger from the combination of the products in Dr. Nelson's deposition. At the time of the deposition the theory seemed to be that lacquer thinner (methyl ethyl ketone, or MEK) by itself would flash but not continue

to burn. But if it is mixed with something else, such as cloth or adhesive remover, it will continue to burn:

> Answer by Dr. Nelson: If we have vapor in this room, and we walk in, and there's a flash, we're going to get our eyebrows singed, our hair singed, and we're going to get some burns. If I take MEK and I mix it with something, and I spread this stuff on your skin, and that flash ignites the MEK within that substance, and it's continually giving off vapor from it, it will continue to burn. If it's in your clothing, clothing will continue to burn. If it's in your shoes and on your shoes and on your feet, it will continue to burn, and if it's mixed within a gooey substance, that gooey substance will continue to burn. We're no longer now talking about just a flash and the fire is gone. We're talking about a continually burning substance, and if you look at the [photographs], this is exactly what happened.

In the initial brief to this court the theory as to the combination of the products is stated as follows:

> From a danger point of view, mixing the two products creates an enhanced danger. . . . Photographs of the burn disclose that the mixture stuck to the skin and ignited, and continued to burn. . . . If you pour MEK on adhesive remover and mix it up and scrape it off, and it gets on your hands and clothing, then you are going to have MEK mixed in with the adhesive remover. . . . If you pour MEK onto a

> permeable surface, the MEK will continue to burn after the initial flash.

But in the reply brief the plaintiffs explain their theory this way:

> At no time did the plaintiff argue that the lacquer thinner became more flammable or changed its propensities. Plaintiff had always argued instead that the adhesive remover became more flammable and created a dangerous condition by using the lacquer thinner.

It seems to us that experimentation on the products in combination might have helped to pin down exactly what it is that happened--did the adhesive remover itself become more flammable when it was mixed with the lacquer thinner? was it the adhesive remover that burned? or did the lacquer thinner burn longer and more dangerously when it was mixed with adhesive remover? What we have is indeed "unscientific speculation."

When they were confronted with the possible loss of their expert, or at least when it became clear that the admissibility of his testimony was under serious attack, the Kirsteins attempted to submit the testimony of a second expert, who had, in fact, performed tests on the products. The district judge refused to allow the submission of his report. The plaintiffs contend that this decision also was an abuse of discretion.

The Kirsteins say they were not given a chance to respond to Parks' attack on Dr. Nelson because the attack came in reply briefs on the motion for summary judgment. We disagree. The issue of the competence of the expert was clearly raised

in the original briefs. But it is also true that the reply briefs contained a more concerted attack on the expert than did the original briefs. The way the issue was presented comes close to sandbagging. But on the facts of this case, we see no abuse of discretion in the way the judge resolved the issue.

First of all, the fact that Dr. Nelson's theory, whatever it was, should have been submitted to testing seems elementary. It would seem, in fact, that testing might have pinned down which product became more dangerous by being mixed with the other--which product was burning. Secondly, it is not so simple a matter to allow the second report. Discovery was closed; all deadlines were final. The report of the second expert is not self-explanatory; it raises more questions than it answers. If the report were allowed, Parks would no doubt want to depose the second expert and perhaps obtain more expert testimony of its own. The admission of the report, in other words, would cause significant delay, or so the district judge could reasonably believe.

The report we are talking about is from Shelby Parchman, who performed tests apparently checking for BTU's on six different samples: 100% adhesive remover; 5% thinner/95% remover; 25% thinner/75% remover; 50% each; 75% thinner/25% remover; and 95% thinner/5% remover. Our view of the unexplained results is that the BTU's (that is, the measurement of heat capacity) increased as more lacquer thinner was added to the mixture. What, if anything, does that tell us about the cause of Kirstein's burns? Furthermore, the product tested by itself is the adhesive remover; there is no test of 100% lacquer thinner. Would the lacquer thinner by itself have greater or less heat capacity than a combination of the products? In short, would the Parchman report be--or, in fact, has it been--the foundation for yet another theory as to

just how the products become more dangerous when used together? The district judge, we think, was well within her discretion not to allow the late addition of another expert to the case. And she was also well within her discretion not to reconsider her rulings.

The Kirsteins put forth a number of other reasons why they should survive summary judgment regardless of whether they have an expert. We reject those reasons. No matter which form it takes, their claim against Parks depends on the combination of the Parks' adhesive remover with lacquer thinner. If there is no evidence of how the products operate in combination, there can be no claim. There is no claim that it was the adhesive remover which exploded; there is no claim that the adhesive remover is more dangerous, by itself, than the ordinary consumer would contemplate. There is no competent evidence as to what, if any, contribution the adhesive remover made to the explosion and the resulting burns. Because Barr has been dismissed, there can be no claim based solely on a lacquer thinner explosion. Furthermore, the lacquer thinner is, in fact, explosive; this is what the warnings on the container are about. And because there is no evidence that what happened would not have happened in the absence of adhesive remover, Parks cannot be held responsible under a res ipsa loquitur theory. For all of these reasons, the judgment of the district court is

AFFIRMED.

983 F. Supp. 753

GEORGE KIRSTEIN and JOY KIRSTEIN, Plaintiffs, vs. W.M. BARR & COMPANY, INC. and PARKS CORPORATION, Defendants.

No. 97 C 0002

UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF ILLINOIS, EASTERN DIVISION

October 28, 1997, Decided
October 31, 1997, Docketed

COUNSEL: For GEORGE KIRSTEIN, plaintiff: Paul R. Schuldiner, Attorney, Chicago, IL.

For W.M. BARR & COMPANY, INC., PARK CORPORATION, THE, defendants: Jeffrey Adam Brauer, Williams & Montgomery, Chicago, IL.

For PARK CORPORATION, THE, defendant: Daniel John Donnelly, Michael James Mullen, Kralovec & Marquard, Chartered, Chicago, IL.

For W.M. BARR & COMPANY INC., PARK CORPORATION, THE, cross-claimants: Jeffrey Adam Brauer, Williams & Montgomery, Chicago, IL.

For PARK CORPORATION, THE, W.M. BARR & COMPANY INC., cross-defendants: Jeffrey Adam Brauer, Williams & Montgomery, Chicago, IL.

For PARK CORPORATION, THE, cross-defendant: Daniel John Donnelly, Michael James Mullen, Kralovec & Marquard, Chartered, Chicago, IL.

For PARK CORPORATION, THE, cross-claimant: Daniel John Donnelly, Michael James Mullen, Kralovec & Marquard, Chartered, Chicago, IL.

JUDGES: Suzanne B. Conlon, United States District Judge.

OPINIONBY: Suzanne B. Conlon

OPINION: MEMORANDUM OPINION AND ORDER

George Kirstein ("Kirstein") and his wife Joy Kirstein ("Joy") (collectively "plaintiffs") sue W.M. Barr & Company, Inc. ("Barr") and Parks Corporation ("Parks") (collectively "defendants"). Counts I and II are products liability claims brought by Kirstein. Count III is a claim for loss of consortium brought by Joy. In Count IV, Joy claims she is entitled to reimbursement for Kirstein's medical expenses under the Family Expense Act. The defendants have filed separate motions for summary judgment pursuant to Fed. R. Civ. P. 56.

BACKGROUND

Plaintiffs are residents of Westmont, Illinois. Barr is a Tennessee corporation with its principal place of business in Tennessee; Parks is a Massachusetts corporation with its principal place of business in Massachusetts. As complete

diversity exists and the amount in controversy exceeds $ 75,000, this court has jurisdiction pursuant to 28 U.S.C. § 1332.

When Kirstein purchased his house, the kitchen, foyer, hallway and bath areas had linoleum flooring. Kirstein decided to replace the linoleum flooring with parquet wood flooring. Kirstein pulled the linoleum off the floor. Defendants' 12(M) Statement of Undisputed Material Facts ("Defs. 12(M)") P 18. Kirstein knew that before laying down the parquet floor tiles, he needed to remove the mastic glue material that remained on the floor; he realized he needed an adhesive remover for this task. Id. On August 16, 1994, Kirstein purchased two gallons of Parks Adhesive Remover, a product manufactured by defendant Parks. Id. P 19. Kirstein read the instructions on the label of the adhesive remover. Id. P 20. The next morning, Kirstein coated the kitchen area with adhesive remover and scooped up what was left behind with a shovel. Kirstein then did the same in the foyer, hallway, and bathroom. Id. P 21. After using the shovel, Kirstein found there was still a residual gelatinous substance on the floor. Id. P 22. He remembered that the adhesive remover instructions stated, "For best results, wash stripped surface with Parks Lacquer Thinner before applying new adhesive." Id.

Kirstein went to a store to purchase lacquer thinner. He bought one gallon of Klean-Strip Lacquer Thinner, a product manufactured by defendant Barr. Id. P 23. Prior to using the lacquer thinner, Kirstein read the instructions, warnings, and labels on the lacquer thinner can. Id. The warning label on the lacquer thinner's main display panel states "EXTREMELY FLAMMABLE" and instructs the user to read other cautions on the back panel. Barr Ex. H. The back panel includes the following cautionary language:

> DANGER! EXTREMELY FLAMMABLE. KEEP AWAY FROM HEAT, SPARKS, FLAME AND ALL OTHER SOURCES OF IGNITION. VAPORS MAY CAUSE FLASH FIRE OR IGNITE EXPLOSIVELY. Do not smoke. Extinguish all flames and pilot lights, and turn off stoves, heaters, electric motors and all other sources of ignition during use and until all vapors are gone. Beware of static electricity that may be generated by synthetic clothing and other sources.

Whenever possible, use outdoors in an open area. Do not use in areas where vapors can accumulate and concentrate such as basements, bathrooms or small enclosed areas. USE ONLY WITH ADEQUATE VENTILATION TO PREVENT BUILD-UP OF VAPORS. Open all windows and doors. Use only with a cross-ventilation of moving fresh air across the work area. If strong odor is noticed or you experience light dizziness, headache, nausea or eye watering - STOP - ventilation is inadequate. Leave area immediately.

Barr Ex. H. The Parks Adhesive Remover label contains the following warning:

> Contact with flame or hot surface may produce toxic gases. KEEP AWAY FROM HEAT, SPARKS, AND FLAME. DO NOT SMOKE. Extinguish all flames and pilot lights, and turn off stoves, heaters, electric motors, and other sources of ignition during use and until all vapors are gone. USE ONLY WITH ADEQUATE VENTILATION. To avoid breathing vapors or spray mist, open windows and doors or use other means to

> ensure fresh air entry during application and drying.

Barr Ex. G.

In preparation for use of the lacquer thinner, Kirstein opened the sliding door on the south side of his house (opposite of the side where he was working), opened his front door, turned off the furnace pilot and the fireplace pilot, and turned down the water temperature of the hot water heater. Defs. 12(M) PP 26, 28; Pl. 12(N) P 3. Kirstein turned on the motorized electric exhaust fan in the downstairs bathroom. Defs. 12(M) P 27. Kirstein knew that his air conditioner was powered by electricity, and was aware of a switch on his furnace that deactivates the blower motor in the air conditioning unit. Id. P 29. He did not deactivate the blower motor. Id. Kirstein testified that he used a rag on a scraper to apply lacquer thinner and to wipe the surface of the floor. Defs. 12(M) P 30; Pl. 12(N) P 4. Kirstein completed the kitchen and then proceeded to the bathroom, the hallway, and the foyer, working his way backwards towards the front door. Defs. 12(M) P 30. To finish the hallway, Kirstein needed to close the front door. Id. P 31. Moments after he closed the front door, the hallway was in flames. Id. Kirstein suffered burns over 20% of his body, with slightly over one-third of those burns on his feet. Pl. Ex. A. Kirstein had full thickness burns on the dorsal and plantar surfaces of both feet. Pl. Ex. A.

DISCUSSION

I. DR. NELSON'S TESTIMONY and FRE 702

Many assertions in the plaintiffs' 12(N) statement are supported only by the deposition testimony of Dr. Gary Nelson, a

safety engineer whose expert testimony plaintiffs proffer. Dr. Nelson is prepared to testify as follows: The risks of using the defendants' products were enhanced by the direction to use lacquer thinner after using the adhesive remover. Pl. 12(N) P 11. Another brand of adhesive remover advises the use of mineral spirits instead of lacquer thinner; mineral spirits are less hazardous than lacquer thinner. Id. PP 22 - 23. Methyl ethyl ketone ("MEK"), the active ingredient in lacquer thinner, is absorbed by permeable objects. Id. P 18. When the products are used together, the "gooey substance thus created" will continue to burn after the MEK "flashes out." Id. P 16. The product labels do not explain that vapor can travel and create an explosive condition outside the area of use. Id. P 19. The lacquer thinner individually, and the lacquer thinner and adhesive remover combined, create a hazardous condition that is beyond the understanding of the homeowner. Id. P 17. Dr. Nelson further explains:

> If we have vapor in this room and we walk in and there's a flash, we're going to get our eyebrows singed, our hair singed, and we're going to get some burns. If I take MEK (the active ingredient in lacquer thinner), and I mix it with something and I spread this stuff on your skin, and that flash ignites the MEK within the substance, and it's continually giving off vapor from it, it will continue to burn....if it's mixed with a gooey substance, that gooey substance will continue to burn. We're no longer now talking about just a flash and the fire is gone. We're talking about a continually burning substance....

Pl. Ex. D at pp. 164

Defendants challenge the admissibility of Dr. Nelson's statements pursuant to Federal Rule of Evidence 702, which provides:

> If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise.

Fed. R. Evid. 702. This rule "clearly contemplates some degree of regulation of the subjects and theories about which an expert may testify." Daubert v. Merrell Dow Pharmaceuticals, Inc., 509 U.S. 579, 589, 125 L. Ed. 2d 469, 113 S. Ct. 2786 (1993). Seventh Circuit cases interpreting Daubert have suggested a two-step inquiry for evaluating expert testimony under Rule 702. First, the court must determine whether the expert's testimony is reliable. Second, the court must determine whether the testimony will assist the trier of fact. Cummins v. Lyle Industries, 93 F.3d 362, 367-68 (7th Cir. 1996).

"In the context of theoretical and applied science, [the first] requirement places on the court the obligation to ensure that the proffered testimony pertains to scientific knowledge." Id. (citing Deimer v. Cincinnati Sub-Zero Prods., Inc., 58 F.3d 341, 344 (7th Cir. 1994); Porter v. Whitehall Labs., 9 F.3d 607, 614 (7th Cir. 1993)). An expert scientific opinion must be grounded in the "methods and procedures of science," and must consist of more than "subjective belief or unsupported speculation." Daubert, 509 U.S. at 589. Put another way, "a district court asked to admit scientific evidence must determine whether the evidence is genuinely scientific, as distinct

from being unscientific speculation offered by a genuine scientist." Rosen v. Ciba-Geigy Corp., 78 F.3d 316, 318 (7th Cir. 1996). In Cummins, the plaintiff argued the application of well-known instruments of the engineering profession to a particular and "not-out-of-the-ordinary" application required substantial deviation from the paradigm announced by the Supreme Court in Daubert. The Seventh Circuit rejected that argument, stating:

> The Supreme Court did acknowledge in Daubert that, because the case presented a matter of scientific inquiry, its discussion was limited to the "scientific context." (citation omitted). The court also noted, just as pointedly, that its holding was not limited to cases involving "novel" scientific theories. [Daubert, 509 U.S. at 592 n. 11]. As the case law of this circuit amply demonstrates, we believe that this latter remark in Daubert counsels against a wholesale abandonment of the Daubert analysis simply because the issue before the court, although rooted in science, involves the application of science to a concrete and practical problem. See, e.g., Buckner v. Sam's Club, Inc., 75 F.3d 290, 292-94 (7th Cir. 1996) (safety management expert); Deimer v. Cincinnati Sub-Zero Prods. Inc., 58 F.3d 341 (7th Cir. 1995) (testimony concerning cord wrap on hospital equipment). Indeed, the drafters of Rule 702 seem to have acknowledged that the line between "scientific" and "technical" is not a bright one.

Cummins, 93 F.3d at 367 n. 2.

Dr. Nelson admits he is not a chemist; he is a safety engineer with an educational background in industrial and product safety. His graduate coursework included a course on fire protection and prevention. Pl. Ex. D. In the last 10 to 25 years, Dr. Nelson has not done any lab work in the fire protection area. Id. at pp. 19, 32. Dr. Nelson contends he did not have the products in this case or their mixture chemically tested because

> it wasn't necessary...the analysis that I performed was a review of the chemical properties based on the material safety data sheets from the point of view of what an industrial hygienist or safety engineer would normally do in relation to those sheets. In other words, I relied on the information provided by Parks and [Barr] rather than doing any of it myself.

Id. at p. 21.

Defendants urge that, based on the record before this court, Dr. Nelson cannot be allowed to present to the factfinder his hypothesis that Parks adhesive remover absorbs MEK from the lacquer thinner and gradually releases MEK vapor, thereby resulting in a continuous and longer burn upon ignition of the MEK vapor on its surface. The material data safety sheet ["MSDS"] for the adhesive remover lists it as nonflammable, and nothing in the record supports a finding that it is flammable. Dr. Nelson does not testify that the flammability of either product was increased by its combination with the other product. Rather, Dr. Nelson's testimony is that the danger of using either product is increased by using the products together, because the absorption of MEK into the adhesive remover can result in a continuous burn. Pl. Ex. D. at p. 164.

The issue, then, is whether Dr. Nelson can testify that both products become more dangerous through the absorption of one into the other.

Even assuming Dr. Nelson's experience as a safety engineer qualifies him to testify about the gradual release of vapor from a substance that has absorbed a liquid, there is no evidence in the record that the Parks adhesive remover actually absorbs MEK from the Klean-Strip lacquer thinner. Dr. Nelson did not perform tests on the products or the combination of the products, and he did not arrange for any such tests to be performed. He offers no clinical testing, data, or studies that suggest the adhesive remover absorbs MEK. Nor does Dr. Nelson offer data or studies suggesting adhesive removers generally, or substances similar in chemical composition to adhesive removers, absorb MEK or chemicals similar in composition to MEK. Indeed, the only information in the record relating to MEK and absorption is: (1) the MSDS for Klean-Strip lacquer thinner which states the lacquer thinner "may be absorbed through the skin" (Barr Ex. F); and (2) Dr. Nelson's description of his testimony in another case where rags and clothing absorbed MEK (Pl. Ex. D. p. 62). However, skin and fabrics may absorb chemicals that adhesive remover does not absorb.

The question whether adhesive remover absorbs the MEK in lacquer thinner and gradually releases MEK vapor is a question of science. An expert scientific opinion must be grounded in the "methods and procedures of science," and must consist of more than "subjective belief or unsupported speculation." Daubert, 509 U.S. at 589. In presenting their hypothesis about the danger of the adhesive remover/lacquer thinner combination, plaintiffs rely upon 16 C.F.R. Part 1500.5, which provides in part:

> It may not be possible to reach a fully satisfactory decision concerning the ... flammable ... properties of a [mixture of substances] from what is known about its components or ingredients. The mixture itself should be tested.

Yet, Dr. Nelson performed no tests and presents no scientific evidence of a synergistic or combinational effect that creates a more continuous or longer burn. He offers only an untested hypothesis. On this record, the court cannot conclude that Dr. Nelson's absorption testimony has a grounding in the methods and procedures of science. Accordingly, that testimony is inadmissible under Fed. R. Evid. 702.

Nor is the court confident about Dr. Nelson's qualifications to testify as an expert on the requirements of the federal labeling laws. When asked for the basis of his opinions, Dr. Nelson could not identify publications in his field or any other sources that recommend the warnings and precautionary language he suggests. He points to no industry customs as evidence of the allegedly required additional warnings. Nor does he provide tests or studies of any kind that demonstrate the value of his proposed additional language, or suggest which warnings and precautions should be removed to make room for all the additional explanations he desires. Although Dr. Nelson claims to consult companies about their warning labels from time to time, he could not identify a single company or individual for whom he has done such work. Dr. Nelson fails to explain the methodology by which people in his field reach their conclusions about required warnings and precautionary instructions under federal law. Indeed, Dr. Nelson admits the basis for his conclusions is the "logical" application of the federal statute -- "a matter of two and two equals four." Pl. Ex. D. at p. 95. This does not inspire great

confidence in his ability to assist the factfinder. Dr. Nelson may not give an opinion that amounts to an unsubstantiated assertion of the warnings that are required by the law. See, e.g., Strickland v. Royal Lubricant Co. Inc., 911 F. Supp. 1460, 1469 (M.D. Ala. 1995).

Nonetheless, Dr. Nelson is a safety engineer by training, and for 12 years he worked at Texas A & M identifying, evaluating, and controlling potential hazards. He testifies safety engineers evaluate hazards "in terms of risk, in terms of the likely severity and probability of mishap, and then you control hazards basically by three methods ... the third is through instructions and warnings and procedures and policies." Pl. Ex. D. at p. 23 - 24. However, Dr. Nelson offers no evidence that he followed that methodology in this case. He presents no evidence of the likely severity and probability of mishap associated with the additional dangers, or that he analyzed these factors; by his own admission, that is how safety engineers evaluate hazards. Rather, Dr. Nelson offers only his conclusions. "[A] district court asked to admit scientific evidence must determine whether the evidence is genuinely scientific, as distinct from being unscientific speculation offered by a genuine scientist." Rosen v. Ciba-Geigy Corp., 78 F.3d 316, 318 (7th Cir. 1996). The Seventh Circuit has repeatedly approved the application of the Daubert standard in cases involving safety experts and matters of applied science. See Cummins, 93 F.3d at 367 n. 2. Accordingly, Dr. Nelson's testimony about additional principal hazards is inadmissible.

II. SUMMARY JUDGMENT STANDARD

A movant is entitled to summary judgment under Rule 56 when the moving papers and affidavits show there is no genuine issue of material fact and the movant is entitled to

judgment as a matter of law. Fed.R.Civ.P. 56(c); Celotex Corp. v. Catrett, 477 U.S. 317, 322, 91 L. Ed. 2d 265, 106 S. Ct. 2548 (1986); Unterreiner v. Volkswagen of America, Inc., 8 F.3d 1206, 1209 (7th Cir. 1993). Once a moving party has met its burden, the non-moving party must go beyond the pleadings and set forth specific facts showing there is a genuine issue for trial. Fed.R.Civ.P. 56(e); Becker v. Tenenbaum-Hill Assoc., Inc., 914 F.2d 107, 110 (7th Cir. 1990). The court considers the record as a whole and draws all reasonable inferences in the light most favorable to the party opposing the motion. Fisher v. Transco Services-Milwaukee, Inc., 979 F.2d 1239, 1242 (7th Cir. 1992).

A genuine issue of material fact exists when "the evidence is such that a reasonable jury could return a verdict for the nonmoving party." Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248, 91 L. Ed. 2d 202, 106 S. Ct. 2505 (1986); Stewart v. McGinnis, 5 F.3d 1031, 1033 (7th Cir. 1993), cert. denied, 510 U.S. 1121, 127 L. Ed. 2d 393, 114 S. Ct. 1075 (1994). "The mere existence of a scintilla of evidence in support of the [nonmoving party's] position will be insufficient; there must be evidence on which the jury could reasonably find for the [nonmoving party]." Anderson, 477 U.S. at 252.

II. PRODUCTS LIABILITY CLAIMS

To prevail on a claim of strict liability under Illinois law, plaintiffs must show: (1) the injury resulted from a condition of the product; (2) the condition was unreasonably dangerous; and (3) the condition existed at the time it left the manufacturer's control. Faucett v. Ingersoll-Rand Min. & Machinery Co., 960 F.2d 653, 655 (7th Cir. 1992). A product may be unreasonably dangerous in two ways: (1) a design or manufacturing defect; or (2) a failure to warn of a danger posed by the

product of which the average consumer would not be aware. Lamkin v. Towner, 138 Ill. 2d 510, 563 N.E.2d 449, 150 Ill. Dec. 562 (1990).

A. Failure to Warn and Preemption under the FHSA

The Federal Hazardous Substance Act ("FHSA") was enacted in 1962 to "provide national uniform requirements for adequate cautionary labeling of packages of hazardous substances which are sold in interstate commerce...." House Comm. on Interstate and Foreign Commerce, Federal Hazardous Substances Labeling Act, H.R. Rep. No. 1861, 86th Cong. 2d Sess. 2 (1960), reprinted in 1960, U.S.C.C.A.N. 2833. When the FHSA was amended in 1966, the legislative history discussed "the impracticality of having the states produce potentially 50 different labels for a particular hazardous substance." Moss v. Parks Corp., 985 F.2d 736 (4th Cir. 1993), cert. denied, 509 U.S. 906, 113 S. Ct. 2999, 125 L. Ed. 2d 693. The 1966 amendment added the following preemption provision:

> If a hazardous substance or its packaging is subject to a cautionary labeling requirement under [the FHSA] designed to protect against a risk of illness or injury associated with the substance, no State ... may establish or continue in effect a cautionary labeling requirement applicable to such substance or packaging and designed to protect against the same risks of illness or injury unless such cautionary labeling requirement is identical to the labeling requirement under [the FHSA].

15 U.S.C. § 1261, Note (b)(1)(A) (emphasis added).

Based on this preemption provision, the great majority of courts around the country have held that as to products governed by the FHSA, a common law tort action based on an alleged failure to warn may be brought only for non-compliance with the FHSA labeling requirements. See, e.g., Moss, 985 F.2d 736; DeHaan v. Whink Prods. Co., 1994 U.S. Dist. LEXIS 650, 1994 WL 24322 (N.D. Ill. Jan. 26, 1994); Busch v. Graphic Color Corp., 169 Ill. 2d 325, 662 N.E.2d 397, 214 Ill. Dec. 831 (Ill. 1996). In Moss, the plaintiff suffered burns when fumes from a paint thinner erupted into flames; the plaintiff alleged the paint thinner manufacturer provided inadequate warnings of the product's propensity to ignite. In affirming the district court's granting of summary judgment, the Moss court held that "if the plaintiff requests a label that is more elaborate or different than the one required by the FHSA and its regulations, the claim is preempted." 985 F.2d at 740. Plaintiffs do not seem to seriously dispute that their state law "failure to warn" claim is preempted to the extent it would impose labeling requirements different from or in addition to those imposed by federal law. Rather, plaintiffs correctly point out they may still recover under state tort law by proving defendants failed to comply with the FHSA.

B. Misbranding Under the FHSA

It is undisputed that Parks adhesive remover and Klean-Strip lacquer thinner are hazardous substances within the meaning of the FHSA. A hazardous substance is misbranded under the FHSA if it fails to bear a label which states conspicuously:

> (e) an affirmative statement of the principal hazard or hazards, such as "Flammable," "Combustible," "Vapor Harmful," "Causes

> Burns," "Absorbed Through Skin," or similar wording descriptive of the hazard;
>
> (f) precautionary measures describing the action to be followed or avoided, except when modified by regulation of the Secretary....

15 U.S.C. § 1261(p)(1).

Parks Adhesive Remover. Plaintiffs argue the labeling of Parks adhesive remover is deficient in several respects. First, plaintiffs argue Parks failed to warn of a "new element of danger" created by using adhesive remover and lacquer thinner in succession. This new danger is the continuous or longer burning caused by the alleged absorption of MEK from the extremely flammable lacquer thinner into the non-flammable adhesive remover, creating a "gooey substance" that gradually releases MEK vapor after the MEK vapor in the air would otherwise have "flashed out." Resp. p. 6. This argument fails to create a genuine issue for trial, because there is no evidence in the record that Parks adhesive remover actually absorbs MEK from lacquer thinner. The only suggestion that this occurs comes from Dr. Nelson; for the reasons previously discussed, Dr. Nelson's testimony about an absorption effect between the two products is inadmissible. Inadmissible testimony cannot be used to withstand summary judgment. Navarro v. Fuji Heavy Industries, Ltd., 117 F.3d 1027 (7th Cir. 1997); Whitted v. General Motors Corp., 58 F.3d 1200, 1204 (7th Cir. 1995).

Because Dr. Nelson's hypothesis that the adhesive remover absorbs MEK is inadmissible, (1) plaintiffs' analogy to extremely flammable contact adhesives found unsafe by the Consumer Product Safety Commission is inapposite and (2)

there is no evidence that any danger stemming from Parks' recommendation of lacquer thinner has anything to do with the successive use of the products, as opposed to the extreme flammability of lacquer thinner. Plaintiffs suggest "[Dr. Nelson's] hypothesis is proven by the photographs of Mr. Kirstein's feet." Given that extremely flammable lacquer thinner was used to wipe the floor at the time of the fire, the fact that Mr. Kirstein's feet were severely burned is -- at most -- a scintilla of evidence in support of Dr. Nelson's hypothesis. The mere existence of a scintilla of evidence is insufficient to create a genuine issue for trial. Anderson, 477 U.S. at 252.

Second, Dr. Nelson "criticizes" the Parks warnings as "not set off within the text." Dr. Nelson does not elaborate on this criticism, or explain how the placement of the warnings violates the FHSA. His conclusory assertion fails to create a genuine issue for trial. Third, Dr. Nelson asserts the instruction on the front display panel to "See other health hazard information on back panel" appears in too small type size. The relevant regulations require this instruction to appear in "the same type size as that required in Table 1 for other cautionary material which appears elsewhere on the label ... [which is] determined by the area of the panel on which it does appear." 16 C.F.R., Part 1500.121(c)(2)(iii). "When an item of labeling is required to be in a specified type size, all upper case, or capital, letters must be at least equal in height to the required type size, and all other letters must be in the same style as the upper case or capital letters." Id., Part 1500.121(c)(2)(ii). The court has examined Table 1, has measured the type size as defined by the regulations, and has found Dr. Nelson's assertion to be factually incorrect.

Finally, Dr. Nelson claims the Parks adhesive remover label violates Part 1500.122 by advertising its product as

"nonflammable" on its front display panel, thereby detracting from the following warnings on the back display panel:

> Contact with flame or hot surface may produce toxic gases. KEEP AWAY FROM HEAT, SPARKS, AND FLAME. DO NOT SMOKE. Extinguish all flames and pilot lights, and turn off stoves, heaters, electric motors, and other sources of ignition during use and until all vapors are gone.

Barr Ex. G. As previously discussed, it is undisputed the adhesive remover is nonflammable, and there is no admissible evidence in the record that, as a matter of chemistry, its flammability changes when used with lacquer thinner. It is plain that the warning to keep the adhesive remover away from "heat, sparks, and flame" relates back to the danger that "contact with flame or hot surface may produce toxic gases." Essentially, Dr. Nelson criticizes Parks for including more cautionary language about sparks and flames than he deems necessary for a nonflammable product that may produce toxic gases when heated. Even assuming Parks showed an abundance of caution in this regard, no reasonable jury could find Parks' accurate description of its product as "nonflammable" is misleading. As a matter of law, Parks' display panels meet the requirements of the federal labeling laws. To the extent Dr. Nelson argues the Parks label should have included additional or different warnings not required by the FHSA or its regulations, those claims are preempted. Moss, 985 F.2d at 740. Accordingly, Parks' motion for summary judgment is granted as to Count II (failure to warn).

Klean-Strip Lacquer Thinner. Dr. Nelson next opines that the warnings and precautionary measures listed on the Klean-

Strip lacquer thinner do not meet the requirements of the 15 U.S.C. § 1261(p)(1)(e) and (f). The entirety of plaintiffs' briefing on this point is quoted here:

> Nelson criticizes the Barr lacquer thinner as not conforming to Section 1261. One principal hazard that is not listed is that MEK is absorbed by clothing, rags and skin. (Plaintiff Answer, Exhibit D, Nelson deposition, page 68) Additionally, the full nature of the hazard is not, in any way, communicated by the phrase, "flammable or extremely flammable." Id. at 70.
>
> Finally, it does not indicate that the vapor can travel and create explosive conditions. (pages 73 - 75) Additionally, section 1261(f) [sic] requires precautionary measures and the precautionary measures stated are inadequate. Id. at page 77.

Resp. at p. 7. As previously discussed, Dr. Nelson's conclusions about additional "principal hazards" are inadmissible under Fed. R. Evid. 702. Without any evidence in the record concerning the severity and probability of mishaps associated with Dr. Nelson's proposed additional hazards, no reasonable jury could conclude those hazards are "principal hazards" for which the FHSA requires explicit warnings.

Dr. Nelson also urges that the precautionary language on the back of the lacquer thinner can is inadequate. Pursuant to Local Rule 12(N), parties opposing summary judgment must set forth in their 12(N) statements additional facts requiring denial of summary judgment. Plaintiffs fail to set out facts in

their 12(N) statement supporting their conclusion that the lacquer thinner's precautionary language is inadequate. Nor do they even bother to set out these facts in their brief. "District courts are not obliged in our adversary system to scour the record looking for factual disputes and may adopt local rules reasonably designed to streamline the resolution of summary judgment motions." Waldridge v. American Hoechst Corp., 24 F.3d 918, 922 (7th Cir. 1994). The court has scoured the deposition testimony of Dr. Nelson, and it concludes his proposed precautionary language is preempted by the FHSA.

The back panel of the lacquer thinner can includes the following cautionary language:

> DANGER! EXTREMELY FLAMMABLE. KEEP AWAY FROM HEAT, SPARKS, FLAME AND ALL OTHER SOURCES OF IGNITION. VAPORS MAY CAUSE FLASH FIRE OR IGNITE EXPLOSIVELY. Do not smoke. Extinguish all flames and pilot lights, and turn off stoves, heaters, electric motors and all other sources of ignition during use and until all vapors are gone. Beware of static electricity that may be generated by synthetic clothing and other sources.
>
> Whenever possible, use outdoors in an open area. Do not use in areas where vapors can accumulate and concentrate such as basements, bathrooms or small enclosed areas. USE ONLY WITH ADEQUATE VENTILATION TO PREVENT BUILD-UP OF VAPORS. Open all windows and doors. Use only with a cross-ventilation of moving fresh air across

> the work area. If strong odor is noticed or you experience light dizziness, headache, nausea or eye watering - STOP - ventilation is inadequate. Leave area immediately.

Barr Ex. H. Among Dr. Nelson's objections to the precautionary language are these: (1) it instructs the user to turn off all sources of ignition instead of instructing the user to turn off the main circuit breaker and the main gas supply, which would be a clearer instruction; (2) it fails to explicitly connect the precaution of turning off all sources of ignition to the risk of fire, and this explanation is required to make the instruction effective; (3) it fails to explain what "vapor" is, and that it is invisible and can travel; (4) it fails to explain what it means by "adequate ventilation"; and (5) it fails to suggest wearing impermeable protective gear and a breathing apparatus. Dr. Nelson presents many ideas for more elegant and elaborate instructions; he fails to explain why the actual precautionary instructions are inadequate under the FHSA. The instructions label cautions the user to turn off all possible sources of ignition. It explicitly mentions the danger of vapors building up and states in bold capitals: VAPORS MAY CAUSE FLASH FIRE OR IGNITE EXPLOSIVELY. It gives consumers a simple and understandable test for judging the adequacy of ventilation: "if strong odor is noticed or you experience light dizziness, headache, nausea or eye watering - STOP - ventilation is inadequate." The fact that more detailed and thorough instructions can be written is unquestionable. Of course, it is possible to write instructions that include definitions of terms like "vapor" and explanations of why and how each precautionary instruction reduces risks. Plaintiffs fail to explain why the actual precautionary instructions are not sufficient to meet the requirements of the FHSA as a matter of law.

Indeed, the Consumer Product Safety Commission ("CPSC"), the agency which oversees enforcement of the FHSA, provides sample warning labels for some products. While sample precautionary instructions are not specifically provided for lacquer thinner, the CPSC has provided sample precautionary instructions for "contact adhesives," the vapors of which are extremely flammable. The CPSC offers the following as sufficient precautionary instructions:

> Prevent buildup of vapors -- open all windows and doors -- use only with cross-ventilation.
>
> Keep away from heat, sparks, and open flame.
>
> Do not smoke, extinguish all flames and pilot lights, and turn off stoves, heaters, electric motors, and other sources of ignition during use and until all vapors are gone.
>
> Close container after each use.
>
> Keep out of the reach of children.

16 C.F.R. § 1500.133(b) (1997). If these precautionary instructions are sufficient, then the precautionary instructions for Klean-Strip lacquer thinner are sufficient as a matter of law. Accordingly, Barr's motion for summary judgment is granted as to Count II (failure to warn).

C. Design and Manufacturing Defects

The second manner in which a product may be unreasonably dangerous is through a design or manufacturing defect. Lamkin v. Towner, 138 Ill. 2d 510, 563 N.E.2d 449, 150 Ill. Dec.

562 (1990). Plaintiffs' only argument that Parks adhesive remover was unreasonably dangerous relates back to Dr. Nelson's MEK absorption hypothesis. As Dr. Nelson failed to provide any support for that hypothesis, a reasonable jury could not find the adhesive remover unreasonably dangerous.

When asked if the lacquer thinner was defective in some way aside from the warnings, Dr. Nelson conceded it was not. Pl. Ex. D. at p. 137 - 138. However, plaintiffs argue the lacquer thinner is unreasonably dangerous under the "consumer contemplation" test because Dr. Nelson opines that to properly use lacquer thinner in an enclosed space, one would have to use respiratory equipment that is not reasonably available to the consumer. Under the consumer contemplation test, "a product is only considered defective or unreasonably dangerous if it fails to perform in a manner the ordinary consumer would expect." Todd v. Societe Bic S.A., 21 F.3d 1402 (7th Cir. 1994). Obviously, the ordinary consumer's expectations relate in some way to the product's warnings. The manufacturer of Klean-Strip lacquer thinner warns, "Do not use in areas where vapors can accumulate and concentrate such as basements, bathrooms or small enclosed areas." Barr Ex. H. Thus, the ordinary consumer would expect that it is dangerous to use lacquer thinner in small enclosed areas.

Second, plaintiffs argue the lacquer thinner is unreasonably dangerous under the "risk-utility" test, because mineral spirits are less dangerous. A product is unreasonably dangerous under the risk-utility test when the product could have been designed to prevent foreseeable harm without hindering its function or increasing its price. Lamkin, 138 Ill. 2d 510, 563 N.E.2d 449, 150 Ill. Dec. 562. Plaintiffs' argument fails for two reasons. First, the Seventh Circuit has questioned whether Illinois courts apply the risk-utility test to simple but

obviously dangerous products. See Todd, 21 F.3d at 1412. Second, even if the test applies, it is not satisfied by showing a completely different product is safer. Even if mineral spirits are less dangerous, that does not mean lacquer thinner can be manufactured to be less dangerous. Accordingly, plaintiffs' argument is without merit. As no genuine issue of material fact exists for trial, both defendants are entitled to summary judgment on Count I.

III. DERIVATIVE CLAIMS

Because Joy Kirstein's claims derive from her husband's product liability claims, defendants are entitled to summary judgment on Counts III and IV.

CONCLUSION

Defendants' motions for summary judgment are granted. Judgment is entered in favor of defendants W.M. Barr & Company, Inc. and Parks Corporation and against plaintiffs George Kirstein and Joy Kirstein.

ENTER:

Suzanne B. Conlon

United States District Judge

October 28, 1997

JUDGMENT IN A CIVIL CASE

Decision by Court. This action came to trial or hearing before the Court. The issues have been tried or heard and a decision has been rendered.

IT IS ORDERED AND ADJUDGED that judgment is entered in favor of defendants W.M. Barr & Company, Inc. And Parks Corporation and against plaintiffs George Kirstein and Joy Kirstein.

Date: 10/28/97

GEORGE KIRSTEIN and JOY KIRSTEIN, Plaintiffs, vs. W.M. BARR & COMPANY, INC. and PARKS CORPORATION, Defendants.

No. 97 C 0002

UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF ILLINOIS, EASTERN DIVISION

December 1, 1997, Decided
December 3, 1997, Docketed

COUNSEL: For GEORGE KIRSTEIN, plaintiff: Paul R. Schuldiner, Attorney, Chicago, IL.

For W.M. BARR & COMPANY, INC., PARK CORPORATION, THE, defendants: Jeffrey Adam Brauer, Williams & Montgomery, Chicago, IL.

For PARK CORPORATION, THE, defendant: Daniel John Donnelly, Michael James Mullen, Kralovec & Marquard, Chartered, Chicago, IL.

For W.M. BARR & COMPANY, INC., PARK CORPORATION, THE, cross-claimants: Jeffrey Adam Brauer, Williams & Montgomery, Chicago, IL.

For PARK CORPORATION, THE, cross-claimant: Daniel John Donnelly, Michael James Mullen, Kralovec & Marquard, Chartered, Chicago, IL.

For PARK CORPORATION, THE, W.M. BARR & COMPANY, INC., cross-defendants: Jeffrey Adam Brauer, Williams & Montgomery, Chicago, IL.

For PARK CORPORATION, THE, cross-defendant: Daniel John Donnelly, Michael James Mullen, Kralovec & Marquard, Chartered, Chicago, IL.

JUDGES: Suzanne B. Conlon, United States District Judge.

OPINIONBY: Suzanne B. Conlon

OPINION: MEMORANDUM OPINION AND ORDER

George Kirstein ("Kirstein") and his wife Joy Kirstein ("Joy") (collectively "plaintiffs") sue W.M. Barr & Company, Inc. ("Barr") and Parks Corporation ("Parks") (collectively "defendants"). Counts I and II are products liability claims brought by Kirstein. Count III and IV are derivative claims brought by Joy. The court granted defendants' motions for summary judgment on all counts. Memorandum Opinion and Order, No. 97 C 002 (N.D. Ill. Oct. 28, 1997). Plaintiffs move for reconsideration of the October 28 opinion pursuant to Fed. R. Civ. P. 59(e).

Motions for reconsideration serve a limited purpose. On reconsideration, a party may not introduce new evidence or legal theories that could have been presented earlier. Caisse Nationale de Credit Agricole v. CBI Industries, Inc., 90 F.3d 1264, 1269 (7th Cir. 1996). A motion for reconsideration may be proper to correct manifest errors of law or to present newly discovered evidence that was unavailable prior to the hearing on summary judgment. In the Matter of Prince, 85 F.3d 314, 324 (7th Cir. 1996), cert. denied, 136 L. Ed. 2d 534, 117 S.

Ct. 608 (1996). However, "[a] Rule 59(e) motion cannot be used to present evidence that could and should have been presented prior to the entry of final judgment." Id.

As the relevant facts are set forth in the October 28 opinion, there is no need to recite them here. Despite plaintiffs' failure to present a coherent statement of Dr. Nelson's theory (or theories) in their 12(N) statement or even in their response brief, the court read Dr. Nelson's deposition testimony in search of that theory. Pursuant to Fed. R. Evid. 702, the court excluded Dr. Nelson's testimony about increased danger from the absorption of MEK. Plaintiffs now argue the court misinterpreted Dr. Nelson's theory, in that Dr. Nelson testified -- in an answer to a question on page 181 of his deposition transcript -- that the flammability of the Parks adhesive remover is increased when combined with Barr's Klean-Strip lacquer thinner.

Pursuant to Local Rule 12(N), parties opposing summary judgment must set forth in their 12(N) statements additional facts requiring denial of summary judgment. Putting aside plaintiffs' failure to comply with the local rules, Dr. Nelson's testimony about "increased flammability" is inadmissible under Rule 702 for the same reasons discussed in the October 28 opinion. Plaintiffs respond that the increased flammability theory and the MEK flash theory are supported by the products' labels, Kirstein's deposition, the photographs of Kirstein's injuries, and other evidence in the record. Pl. Mot. PP 1, 6, 13. Plaintiffs fail to explain how merely reading the two labels, reading Kirstein's deposition, or viewing photographs can support a theory that the successive use of defendants' products creates a more "explosive" mixture or increases the flammability of the Parks adhesive remover. More importantly, plaintiffs failed to provide these

explanations when they responded to defendants' motions for summary judgment. Plaintiffs' new arguments come too late.

On November 5, 1997, plaintiffs' motion to disclose Shelby Parchman -- an additional expert who performed chemical testing -- came before the court. As the court's October 28 opinion granting summary judgment had already been issued, the court ruled that plaintiffs' motion to disclose an additional expert was moot. Plaintiffs challenge this ruling, arguing that Parchman's affidavit supports Dr. Nelson's theory and that "it is obvious" Dr. Nelson's qualifications did not become an issue until Parks filed its reply brief. Pl. Mot. PP 2 - 4, 12. On the contrary, Barr raised the issue of Dr. Nelson's qualifications in its motion for summary judgment. Barr's Summary Judgment Motion at pp. 14 - 15. Plaintiffs urge Barr's argument was merely an "afterthought," and was not truly presented in its summary judgment motion. However, Barr devoted two pages of its brief arguing that Dr. Nelson lacked a chemistry background. Plaintiffs were clearly put on notice then (if not at Dr. Nelson's deposition) that chemistry was critically important to their case. Plaintiffs thus had ample opportunity to address these arguments in their response.

More importantly, plaintiffs cannot reasonably assert that the aspects of their case based on chemistry could survive summary judgment without presenting either chemical testing, studies applying or discussing the chemical principles at issue, or some sort of chemical foundation for their expert's opinion. Disclosure of experts in this case was to be complete by May 21, 1997. Plaintiffs argue that in November 1997 -- after discovery closed, after defendants exposed the deficiencies in plaintiffs' case, and after the court granted summary judgment -- plaintiffs should be allowed to retain and disclose another expert who might establish a material issue for trial.

This would undercut the purpose and finality of dispositive motions.

Plaintiffs argue it was fundamentally unfair for the court to find their motion to disclose Shelby Parchman moot, because the court had previously granted defendants leave to file additional support for their summary judgment motions. Plaintiffs ignore that defendants were granted leave to file additional support in part because the court granted plaintiff's request for a (nearly) two month extension to file plaintiffs' response.

Plaintiffs argue the court wrongly excluded Dr. Nelson's testimony because the court "ignored" Dr. Nelson's Exhibit 4 "which discussed at length principles of safety engineering and rules of hazard control." Plaintiffs misunderstand the Seventh Circuit's interpretation of Daubert. "[A] district court asked to admit scientific evidence must determine whether the evidence is genuinely scientific, as distinct from being unscientific speculation offered by a genuine scientist." Rosen v. Ciba-Geigy Corp., 78 F.3d 316, 318 (7th Cir. 1996). It is not enough for plaintiffs to demonstrate Dr. Nelson belongs to a field that employs scientific principles, or even that Dr. Nelson usually applies those principles in his work. Rather, Dr. Nelson had to explain how he applied those principles in this case. He failed to do so, despite ample opportunity. Plaintiffs argue the court "ignored" (1) the fact that Dr. Nelson has testified as an expert in "scores of cases throughout the United States"; and (2) Dr. Nelson's "extensive resume." Again, these facts are irrelevant to whether Dr. Nelson's testimony in this case was admissible. Plaintiffs argue that Dr. Nelson is not a "junk scientist." The court's October 28 opinion does not conclude that Dr. Nelson is a junk scientist. He may well be a genuine scientist who offered unscientific speculation in this case. See id.

Plaintiffs' remaining arguments were considered, addressed, and rejected in the October 28 opinion. Plaintiffs offer no valid reason why they should be reconsidered.

CONCLUSION

Plaintiffs' motion for reconsideration is denied.

ENTER:

Suzanne B. Conlon

United States District Judge

December 1, 1997

Supreme Court, U.S.
FILED
MAR 8 1999
OFFICE OF THE CLERK

No. 98-1257

IN THE

Supreme Court of the United States

OCTOBER TERM, 1998

GEORGE KIRSTEIN and JOY KIRSTEIN,

Petitioners,

v.

PARKS CORPORATION,

Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

BRIEF OF PARKS CORPORATION IN OPPOSITION

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QUESTION PRESENTED FOR REVIEW

The question actually presented for review is whether a trial court confronted at the conclusion of discovery with a motion for summary judgment raising a *Daubert* challenge must hold a separate evidentiary hearing before ruling on that motion.

STATEMENT OF THE CASE

The facts were taken from submissions, including the 190-page deposition of plaintiffs' expert witness, filed in the course of summary judgment.

Plaintiff George Kirstein used defendant Parks Corporation's adhesive remover on his floor. Kirstein then used a lacquer thinner to remove the remaining residue. A fire ensued, injuring Kirstein. Plaintiffs claimed Parks' adhesive remover was unreasonably dangerous. Plaintiffs' only expert witness, Dr. Nelson, opined the adhesive was unreasonably dangerous because a chemical in the lacquer thinner was absorbed into the residue of the adhesive remover and resulted in a continuous burn once the vapors from the thinner were ignited. App. at 18a, 19a (appendix to the petition). After discovery was closed, defendants including Parks Corporation moved for summary judgment and raised a *Daubert* challenge to plaintiffs' expert. App. at 38a.

The trial court reviewed Nelson's deposition. App. at 37a. That court noted that Nelson was not a chemist, did not test the chemicals, and did not follow the scientific methodology he said engineers use. App. at 18a, 21a, 39a. Nelson did not testify that the adhesive's flammability was increased by its combination with the lacquer thinner. App. at 18a. Finally, there was no scientific evidence that Parks' adhesive remover absorbed a chemical from the lacquer thinner. App. at 19a. [Parks also presented its own technical evidence denying any synergistic effect when the two chemicals were combined. Doc. No. 39, Parks mem., Ex. B.]

The trial court applied *Daubert* and found Nelson's testimony on this point inadmissible. *Kirstein v. W.M. Barr & Company*, 983 F.Supp. 753 (N.D. Ill. 1997). Plaintiffs attempted to add, in a F.R.C.P. 59(e) motion, the report of a witness who tested the chemicals, but the court denied that tardy request. App. at 38a. The Seventh Circuit affirmed, noting there was no evidence of how the two products acted in combination. *Kirstein v. Parks Corporation*, 159 F.3d 1065, 1069 (7th Cir. 1998).

ARGUMENT

THERE IS NO CONFLICT AMONG THE CIRCUITS, AND THE QUESTION OF WHETHER THE TRIAL COURT PROPERLY APPLIED *DAUBERT* AND BARRED CERTAIN EXPERT TESTIMONY UNDER THE PARTICULAR FACTS OF THIS CASE IS NOT APPROPRIATE FOR REVIEW BY THIS COURT.

The record shows the trial court carefully followed *Daubert* and its progeny in deciding the admissibility of plaintiffs' contested "scientific" evidence. The court had before it all the evidence plaintiffs wanted it to have. It reviewed the various documents submitted, including the deposition of the expert witness whose testimony was challenged in the summary judgment motion. It then performed the gatekeeper function ordered by this Court. *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579, 589, 596, 113 S.Ct. 2786, 2794, 2798 (1993); *General Electric Company v. Joiner*, 522 U.S. 136, 118 S.Ct. 512, 517 (1997). Based on the evidence, the court concluded that plaintiffs'

proffered scientific opinion that the fire was caused by an unreasonably dangerous condition of Parks' product did not meet the *Daubert* test.

Petitioners raise no circuit court or even district court conflict as to the precise procedure to use when applying *Daubert*. Petitioners simply contend there must be a separate *Daubert* hearing, arguing by implication that the admissibility of scientific evidence cannot be decided in the course of summary judgment. However, the petition provides no specific grounds for placing further constraints on the procedure to be used when determining the admissibility of evidence under *Daubert* and offers no reason why such a determination cannot be made during a summary judgment proceeding. In fact, this Court implicitly approved such a procedure in *General Electric Company v. Joiner*, *id.* at 516. The *Daubert* question at issue there actually arose out of a summary judgment proceeding, and all involved accepted use of that procedure without contest.

In any event, the trial court here had all the evidence plaintiffs wanted to introduce, and the court carefully weighed that evidence. The due process requirements recited in *In re Paoli Railroad Yard PCB Litigation*, 916 F.2d 829, 854 (3rd Cir. 1990) (reversed because depositions of expert witnesses were not even allowed), were thus completely met. Therefore, even if there is a need to create further standards for applying *Daubert*, the facts of this case do not present the appropriate forum.

CONCLUSION

For the reasons stated, respondent Parks Corporation requests that the petition for writ of certiorari be denied.

Respectfully submitted,

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Supreme Court, U.S.
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No. 98-1237

In the

Supreme Court of the United States

October Term 1998

GEORGE KIRSTEIN and JOY KIRSTEIN,

Petitioners,

-v-

PARKS CORPORATION,

Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

REPLY TO BRIEF IN OPPOSITION

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ARGUMENT

THE CONFLICT BETWEEN THE CIRCUITS IS OVER THE PROCEDURE NECESSARY TO SATISFY DUE PROCESS IN RULING ON DAUBERT ISSUES.

The record shows that the trial court did follow its gate keeper function pursuant to Daubert v. Merrill Dow Pharmaceuticals, 509 U.S.579, 589, 113 S.Ct.2786, 2794 (1993). However, it did this in an arbitrary fashion by declaring, without any support in the record, that the question of whether adhesive remover absorbs and then gradually releases vapor is a question of science. Mem.Op. App. at 19a This initial conclusion was the source of all criticisms the Court leveled against Nelson's opinion. This is because if the opinion was a matter of science, and Dr. Nelson was deemed not to be a scientist, then he could not possibly testify on the interaction of the two chemicals without using additional scientific evidence.

The Court's criticisms of Dr. Nelson, that he did not follow methodology that engineers use and did not testify that the adhesive's flammability was increased by its combination with the lacquer thinner, are unsupported by the record. The only testimony on the subject, is Dr. Nelson's testimony that it was not necessary to perform a review of the chemical properties based on a test because he was able to use the material safety data sheets. This procedure was of the same intellectual rigor required by his profession. App. at 18(a)

There were a lot of things that Nelson could have done, none of which were testified as being necessary. Interestingly, the respondent does not contest that the record was devoid of any witness stating that Nelson's opinion needed to be supplemented by chemical testing. This disjointed scatter-shot attack and disjointed scatter-shot analysis destroyed the

plaintiff's case without the plaintiff having a reasonable opportunity to respond. The Seventh Circuit acknowledged, "[t]he way the issue was presented comes close to sandbagging." App. at 8(a) The argument was raised in the briefs and was not raised through submission of issues of material fact which is required by local Rule 12 of the Northern District of Illinois. The Seventh Circuit roundly approved this way of disposing of expert witness issues and soundly rejected the procedure set forth in In Re Pac'l Railroad Yard PCB Litigation, 916 F.2d 829 (3d Cir. 1990), saying that "we . . . have, in fact, upheld a judge's sua sponte consideration of the admissibility of expert testimony." App. 4a This Court should insist on due process guidelines given the importance of expert testimony and the normal way expert testimony is presented to the Court, through F.R.Civ.P.26 disclosures.

Parties are entitled to fundamental due process when dispositive motions are ruled on in their cases. Rule 56 of the Federal Rule of Civil Procedure has extensive evidentiary and procedural guidelines. Most of the federal districts have enacted local rules which also state procedural methods of handling a dispositive motion. Here, the Seventh Circuit upheld the defendant's use of briefs to raise issues for the first time, even though the local rule required issues to be placed in statements of material facts. This should not be allowed to continue.

This Court, in Daubert, instructed the courts to rule on expert admissibility in extremely broad terms. The court asked federal district courts to be "gatekeepers" and to examine an expert's testimony by determining testability, publication, rate of error, and general acceptance in the community, 509 U.S. at 593, 595, 113 S.Ct. at 2796, 2798. It is time for this Court to go further and to establish standards for analyzing the broad Daubert questions. Can a district court sua sponte dismiss an expert? Should a district court rely on

matters outside of the record in determining what is scientific and what is not? Are a district court's criticisms of an expert, without any factual support from other experts, allowable? Should a specific motion under Daubert be filed, and should a FRE 104 hearing be held? If a court can dismiss an expert sua sponte, what kind of warning is available to the party proffering the expert?

The petitioners do not argue that there has to be a hearing in all cases. The petitioners do argue that a Daubert issue cannot be raised as part of multiple issues in a summary judgment motion. This creates a tremendous burden on the party proffering the expert. Not only does the party have to respond to a summary judgment motion on matters of law and fact relating to the merits of the case, but must also ensure that every statement the expert has made is testable, subject to peer review, has undergone testing and has been accepted by the scientific community. A summary judgment motion is too unfocused for this type of inquiry. The proper way to test an expert's qualifications and opinion is to file a specific motion excluding the expert testimony, stating in the motion the precise nature of the expert's failings. If the district court finds there are additional failings, outside of the party's submission, then the respondent should be given the opportunity to respond rather than to have the expert be summarily stricken. This procedure will ensure fundamental due process and a measure of justice. To hold otherwise will require the party proffering an expert to fully establish all of these factors in the party's Rule 26(a) disclosure. That will require large costs and time expenditures for both plaintiffs and defendants prior to any whisper of criticism of either the expert or his opinion.

CONCLUSION

For the reasons stated, the petitioners, George Kirstein and Joy Kirstein, respectfully request that the petition for writ of certiorari be granted.

Respectfully submitted,

LAW OFFICES OF PAUL R. SHULDINER

By:_____

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Dated: March 18, 1999